DAVIS AND OTHERS v. ANDERSON.*

Supreme Court of Appeals: At Staunton.

September 12, 1901.

1. PARENT AND CHILD—*Support—Contracts—Past consideration.* A son is under no legal obligation to support his mother, and his contract to pay for her past support, furnished without his request, is without consideration.

2. CONTRACTS—*Consideration—Moral obligation—Past consideration.* A moral obligation to be sufficient to sustain a promise or contract must be one which has been once a valuable consideration, but has ceased to be binding from some supervenient cause. A past consideration which imposed no legal obligation at the time it was furnished will not support a promise.

3. CHANCERY PRACTICE—*Pendente lite purchaser—Volunteers—Irregular proceedings.* A voluntary grantee, *pendente lite*, takes in subordination to the rights of the creditors of his grantor adjudicated in the suit, and cannot impeach the proceedings in that suit by an independent suit brought for that purpose, however irregular the latter may be.

Appeal from a decree of the Circuit Court of Rockbridge county, pronounced September 8, 1898, in a suit in chancery wherein the appellee was the complainant, and the appellees were the defendants.

Reversed.

The opinion states the case.

J., J. L., and R. Bumgardner, for the appellants.

C. S. W. Barnes, for the appellee.

WHITTLE, J., delivered the opinion of the court.

In June, 1890, Lucy F. Weeks brought an action of assumpsit in the Circuit Court of Rockbridge county against James T. Freeman, a non-resident, and caused to be issued an ancillary attachment, which was levied July 2, 1890, upon an undivided moiety of 116 acres of land, the property of the defendant.

On July 23, 1890, Freeman executed a deed by which he conveyed his interest in the land to his sister, Fannie L. Anderson, "in consideration of the care and attention of my mother, Lucy Freeman, who has been blind for the last ten years, to me fully paid by Fannie L. Anderson . . ., the receipt of which is hereby acknowledged." This deed was acknowledged, in substantial compliance with the requirement of the statute, and admitted to record.

* Reported by M. P. Burks, State Reporter.

The defendant, Freeman, appeared and pleaded to the action, and upon the issue joined a verdict and judgment were rendered against him at the November term 1890.

No further proceedings were had upon the attachment, and no memorandum was left with the clerk to be recorded and indexed, as required by section 3566 of the Code.

In a suit in chancery brought afterwards to enforce her lien, the property was sold and purchased by the plaintiff, Lucy F. Weeks, and she, having become the owner of the other moiety, sold and conveyed the entire tract of 116 acres to appellants, Samuel A. Davis and William J. Hite. Thereupon, Fanny L. Anderson filed a bill in equity against the appellants, Davis, Hite and Lucy F. Weeks, in which she alleged that before Lucy F. Weeks had acquired any lien upon the undivided moiety of her brother, James T. Freeman, complainant had become the *bona fide* purchaser thereof for valuable consideration and without notice, and vouched the deed of July 23, 1890, to sustain the allegation. She insisted that she was not a party to the suit in which her property was sold and not bound by any of the proceedings therein. A paper purporting to be the answer of Davis and Hite, denying generally the allegations of the bill, was copied into the record, but seems never to have been formally filed, and was not noticed in any of the decrees in the cause.

The bill prayed for partition of the land, and that appellants be required to account to the plaintiff for the rents and profits of her moiety thereof during the time they were respectively in the possession and enjoyment of the same.

The commissioner, to whom the case was referred, reported that the land was not susceptible of convenient partition in kind, and ascertained the amounts for which the defendants were respectively liable to the plaintiff for its use and occupation.

Exceptions were taken by the defendant to the report, which the court overruled, and the report was confirmed. The plaintiff was declared entitled to an undivided moiety of the land, which was decreed to be sold for partition, and the amounts ascertained to be due by the defendants to the plaintiff for rents and profits were decreed against them respectively.

From that decree this appeal was allowed.

A number of questions have been raised and discussed by counsel, chiefly affecting the regularity of the proceedings on the attachment and in the suit in chancery in which the property in controversy was

sold, but the view which this court takes of the matter renders it unnecessary to notice them in detail.

The real question involved is, whether the consideration in the deed from Freeman to his sister, *was a valuable consideration* or merely *a meritorious consideration.* If the former, she was clearly entitled to the relief accorded by the decree of the trial court, but if the latter, it is equally clear that she was not so entitled, as against the creditor of her grantor. Section 2459 of the Code provides that "Every gift, conveyance, assignment, transfer, or charge, which is not upon a consideration deemed valuable in law . . . shall be void as to creditors whose debts shall have been contracted at the time it was made."

A contract founded upon a good but not upon a valuable consideration is considered merely voluntary; and, while binding between the parties, is void as to creditors. Chit. Cont. 28. For a moral obligation to be sufficient to sustain a promise or conveyance, it must be one which has been once a valuable consideration, but has ceased to be binding from some supervenient cause, as for example, the statute of limitations, or the intervention of bankruptcy. But a past consideration, which imposed no legal obligation at the time it was furnished, will support no promise whatever.

There is not a suggestion that the alleged past services of the grantee for her afflicted mother, the sole consideration for the deed in question, were rendered in pursuance of a contract between the grantor and herself. Such an allegation, *if proved,* would have presented quite a different question. But the case under consideration is one in which a brother indebted to insolvency, after suit brought, divests himself of all the property which he owns within the jurisdiction of the court, by a deed to his sister, based upon past services alleged to have been rendered by her for their mother. The services were neither alleged nor proven to have been performed at the request of the brother, express or implied. Such a consideration is in no sense a valuable consideration, and the grantee in the deed occupied the position of a volunteer and not of a *bona fide* purchaser for value. There was no obligation resting on either the son or the daughter to care for and support their mother, and the high moral obligation to discharge that duty was as incumbent upon the one as the other.

A past consideration which did not place the grantor under a legal obligation at the time the services are alleged to have been rendered cannot be regarded a sufficient consideration to sustain a deed from an embarrassed debtor to his sister, executed after legal proceedings had

been commenced by a creditor to subject the property to the payment of his debt.

While *bona fide* purchasers for value are a highly favored class, and courts of equity are always solicitous to uphold their rights, it would be indeed a dangerous precedent to enlarge the doctrine so as to embrace in that category alienees of debtors, whose memories have been refreshed and consciences quickened into action and a recognition of past moral considerations moving from near relations, only after suit brought to subject their property.

This court, in the recent case of *Stoneburner & Richards* v. *Motley*, 95 Va. 788, quotes with approbation the language of Wightman, J., in *Beaumont* v. *Reeve*, 8 Adolph. & Ell. 486, that, "A precedent moral obligation, not capable of creating an original cause of action, will not support an express promise." And adds, "It is clear that independent of the express promise on the part of the son made after the services were rendered, there could, in this case, have been no recovery upon the original cause of action, for it rested upon no consideration from which the law would have implied a promise to pay, and therefore the subsequent promise is insufficient."

Occupying the position of a volunteer, had Fannie L. Anderson been made a defendant to the chancery cause in which the land was sold, her deed would have interposed no valid defence. Her rights, therefore, under said conveyance, being subordinate to those of the creditor of her grantor, she cannot be permitted to impeach those proceedings in the independent suit which she has brought, for that purpose, however irregular they may have been.

For the foregoing reasons the decree complained of must be reversed and annulled, and an order will be made here dismissing appellee's bill with costs. *Reversed.*

NOTE.—If a conveyance by an insolvent debtor could be supported, as against his creditors, by a merely moral consideration, as was attempted in this case, the statutes of fraudulent and voluntary conveyances might as well be repealed. There are probably few persons, solvent or insolvent, who do not owe moral obligations outweighing, in their own minds, the value of any estate that they possess. The refusal of the court to open so wide and so easy a door of escape for slippery debtors is too obviously sound for comment.

In the statement in the opinion, accredited to Chitty, that a "contract" based on a good, but not a valuable, consideration, "while binding between the parties, is void as to creditors," the court has inadvertently used the word "contract" instead of "deed," as used by Chitty. A contract (not by deed) with only a "good" consideration (as natural love and affection) to support it, is invalid even

as between the parties. But if under seal, the seal affords conclusive evidence of valuable consideration, and renders the contract valid as between the parties, though as to creditors it will still be treated as voluntary. Such is Chitty's statement, and such we think the court meant to affirm.

KING V. NORFOLK & WESTERN RAILWAY CO.*

Supreme Court of Appeals: At Staunton

September 12, 1901.

1. PLEADING—*Bill of particulars—When part of declaration—Demurrer.* Ordinarily a bill of particulars is no part of the declaration, and objections to it cannot be raised by demurrer to the declaration, but the rule is otherwise where the parties agree in writing that the case made by the declaration may be supplemented by the bill of particulars.

2. RES JUDICATA—*Case at bar.* A suit to construe a deed and determine the respective rights of the grantor and grantee, without alleging any breach of alleged conditions in the deed, is not a bar to a suit alleging conditions subsequent and a breach thereof by the grantee, and asserting rights in consequence of such breach.

3. CONDITIONS SUBSEQUENT—*Covenants—Rule of construction—Case at bar.* Conditions subsequent are not favored in law, as they tend to destroy estates. When relied upon to work a forfeiture, they must be created by express terms, or clear implication, and are strictly construed. If it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to hold it a covenant, and leave the parties to their appropriate remedies for its breach. In the case at bar, the deed, being founded on a valuable consideration, will be construed most strongly against the grantor, and, looking to the whole case, and especially to the absence of any clause of re-entry in the deeds, and to the construction placed on them by the parties, the restrictive clause will be held to be a covenant.

4. DEEDS—*Clause against alienation—Alienation for like purposes as original grant—Res judicata.* The alienation of one railroad company to another, for the purposes originally contemplated by the grantor, does not violate the spirit of a clause against alienation by the first grantee. *King* v. *N. & W. Ry. Co.* 90 Va. 210.

5. CONSTRUCTION OF WRITTEN INSTRUMENTS—*Parties' construction.* Where the language of an instrument is ambiguous, and the intention of the parties is the subject of inquiry, the construction placed upon such language by the parties themselves is entitled to great weight.

6. EJECTMENT—*Plaintiff's estate.* An action of ejectment does not lie to recover the mere use of unemployed lands for an uncertain and indefinite period. Code, secs. 2730, 2748.

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*Reported by M. P. Burks, State Reporter.